A

DIRECTOR OF FORESTS, SARAWAK & ANOR

v.

BALARE JABU & ORS AND ANOTHER APPEAL

B

FEDERAL COURT, KUCHING
ARIFIN ZAKARIA CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
[CIVIL APPEALS NO: 02(i)-50-2011 (Q) & 02-56-09-2011 (Q)]

C

2 OCTOBER 2012

***CIVIL PROCEDURE**: Appeal - Interlocutory appeals - Respondents' claim for native customary rights - Appellants' application to strike out action - Whether action time barred - Whether respondents' claim*

D

disclosed cause of action that should be determined by full trial - Whether triable issue could be disposed summarily in the absence of any strong evidence to substantiate it

***CIVIL PROCEDURE:** Declaratory relief - Native customary rights, claim for - Whether action time barred - Whether appellants' act a*

E

continuing injury or damage upon respondents' native customary rights - Whether respondents had valid cause of action - Public Authorities Protection Act 1948, s. 2(a)

***LAND LAW:** Customary land - Native customary rights, claim for -*

F

Whether action time barred - Whether appellants' act was a continuing injury or damage upon the respondents' native customary rights - Whether respondents had a valid cause of action - Public Authorities Protection Act 1948, s. 2(a)

G

***LIMITATION:** Public authorities - Whether action time barred - Native customary rights - Respondents' claim for declaratory reliefs - Whether appellants' act was a continuing injury or damage upon the respondents' native customary rights - Whether respondents had a valid cause of action - Public Authorities Protection Act 1948, s. 2(a)*

H

The interlocutory appeals herein were brought against the decision of the Court of Appeal reversing the High Court's decision in allowing the appellants' striking out application against the respondents' claim. The respondents claimed for numerous

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declaratory reliefs which included a claim of native customary rights ('NCR') and that the issuance of a timber licence ('the licence')

by the appellants in the first appeal in favour of the appellant in the second appeal was null and void in so far as it impaired the respondents' NCR land. In the High Court, the learned trial judge allowed the appellants' application to strike out the respondents' claim under O. 18 r. 19 of the Rules of the High Court 1980 ruling that the Public Authorities Protection Act 1948 ('the Act') and the Limitation Ordinance of Sarawak had barred the respondents' claim. In his conclusion, the learned trial judge made a finding that the action was only commenced by the respondents in 2007 when the licence was granted in 1992 and the respondents were aware of the existence of the licence and trespass into their NCR land in 1995. On appeal, the Court of Appeal reversed the High Court's decision and held that limitation was not an answer to a suit, action or proceeding for declaratory orders. Further, it was held that a declaration as to whether or not the rights of the respondents were infringed was not purely academic despite the absence of any order for compensation or damages payable. Dissatisfied with the said decision, the appellants appealed to this court.

Held (dismissing appeal; action to proceed for full trial)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The second limb of s. 2 of the Act should apply, namely, being "the case of a continuance of injury or damage". It was clearly stated in the licence granted that the date of issuance was on 30 March 1992, while the date of expiry was on 29 March 2012. Therefore, the licence was still valid at the time the action was filed. (para 10)

(2) As long as the licence remained valid, it continued to be subject to the respondents' NCR, if any, and rights in respect of the land concerned. Accordingly, the second limb of s. 2(a) of the Act applied, being a continuing injury or damage upon the NCR and the respondents' rights. Hence, the respondents' action was well within time since time would only begin to run from 30 March 2012. (para 12)

(3) The argument posed by the appellant in the second appeal that it had not been exercising its rights conferred by the licence for the preceding years and therefore the injury or damage could not be said to be continuous, must be brought

up at trial and not to be disposed summarily in the absence of any strong evidence to substantiate the same since it was a triable issue. Further, the claim to the NCR land by the respondents disclosed a cause of action that should be determined by a full trial. (para 13)

(4) As long as the licence remained valid, there was always a threat to the respondents' NCR and rights which entitled them to a valid cause of action premised on the second limb of s. 2(a) of the Act. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan-rayuan interlokutori di sini telah dibawa terhadap keputusan Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi yang membenarkan permohonan perayu-perayu untuk membatalkan tuntutan responden-responden. Responden-responden telah menuntut beberapa deklarasi termasuk tuntutan hak tanah adat mereka ('NCR') dan bahawa pengeluaran lesen balak ('lesen') oleh perayu-perayu dalam rayuan pertama kepada perayu dalam rayuan kedua adalah terbatal dan tidak sah memandangkan ianya menjejaskan tanah NCR pihak responden. Di Mahkamah Tinggi, yang arif hakim membenarkan permohonan perayu-perayu untuk membatalkan tuntutan responden-responden di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dengan memutuskan bahawa tuntutan responden-responden telah dihadkan oleh Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta') dan Ordinan Had Masa Sarawak. Dalam kesimpulannya, yang arif hakim perbicaraan telah membuat pendapatan bahawa tindakan itu hanya telah dimulakan pada tahun 2007 apabila lesen diberi pada tahun 1992 dan responden-responden sedar akan kewujudan lesen dan pencerobohan terhadap tanah NCR mereka pada tahun 1995. Atas rayuan, Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi dan memutuskan bahawa had masa bukanlah suatu jawapan kepada guaman, tindakan atau pun prosiding bagi perintah deklarasi. Tambahan, ianya juga diputuskan bahawa suatu deklarasi mengenai sama ada hak responden-responden terjejas bukanlah sepenuhnya berbentuk akademik walaupun dengan ketiadaan perintah untuk pampasan atau gantirugi yang kena dibayar. Tidak puas hati dengan keputusan tersebut, perayu-perayu merayu ke mahkamah ini.

Diputuskan (menolak rayuan; tuntutan diteruskan dengan perbicaraan penuh)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Cabang kedua s. 2 Akta harus terpakai, iaitu, "dalam hal kecederaan atau kerosakan yang berterusan". Jelas dinyatakan dalam lesen yang diberi bahawa tarikh pengeluaran adalah pada 30 Mac 1992, manakala tarikh luputnya adalah pada 29 Mac 2012. Oleh itu, lesen tersebut masih sah pada masa tindakan difailkan.

(2) Selagi lesen masih sah, ianya telah menjadi tertakluk kepada NCR responden-responden, jika ada, dan hak berkenaan tanah terbabit. Cabang kedua s. 2(a) Akta terpakai, menjadikannya suatu kecederaan atau kerosakan yang berterusan terhadap hak NCR pihak responden. Oleh itu, tindakan responden-responden adalah dalam masa memandangkan masa hanya akan bermula dari 30 Mac 2012.

(3) Penghujahan perayu dalam rayuan kedua bahawa ianya belum melaksanakan haknya bagi tahun-tahun terdahulu di bawah lesen, mesti dibangkitkan semasa perbicaraan dan bukannya dilupuskan secara ringkas dalam ketiadaan keterangan kuat untuk mengesahkan penyataannya memandangkan ianya adalah perkara yang boleh dibicarakan. Lagi pun, tuntutan terhadap tanah NCR oleh responden-responden mendedahkan satu kausa tindakan yang sepatutnya diputuskan semasa perbicaraan penuh.

(4) Selagi lesen masih sah, NCR responden-responden dan hak mereka akan sentiasa terancam di mana ianya melayakkan mereka kepada suatu kausa tindakan sah berpremis atas cabang kedua s. 2(a) Akta.

Case(s) referred to:
Ibrahim Mohideen Kutty v. Timbalan Menteri Dalam Negeri & Ors [2003] 6 CLJ 144 HC ***(refd)***
Ronald Beadle v. Hamzah HM Saman & Ors [2007] 1 CLJ 421 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19
Public Authorities Protection Act 1948, s. 2(a)

[Civil Appeal No: 02(i)-50-2011 (Q)]
For the appellants - Datuk JC Fong; SC
For the respondents - Baru Bian; M/s Baru Bian

[Civil Appeal No: 02-56-09-2011 (Q)]
For the appellant - Tan Thiam Teck; M/s The Law Firm
For the respondents - Baru Bian; M/s Baru Bian

[Appeal from Court of Appeal, Kuching; Civil Appeal No: Q-01-84-08]

Reported by Kumitha Abd Majid

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] There are two appeals before us. They were heard together since they involved the same parties and similar questions of law considered by the courts below and argued before us. The parties also agreed that we should hear the appeals together. Thus, for convenience and where appropriate in this judgment we refer to these appeals as Appeal 1 for Appeal No: 02(i)-50-2011 (Q) and Appeal 2 for Appeal No: 02()-56-9/2011 (Q).

[2] Further, in this judgment the 1st and 2nd appellants in Appeal 1 and the appellant in Appeal 2 are referred to collectively as the appellants unless indicated otherwise.

[3] Briefly, the respondents were the plaintiffs. In their statement of claim dated 9 April 2007, the plaintiffs claimed for numerous declaratory reliefs including a claim of native customary rights (NCR) over an area of land in Kampong Long Lamai, Miri, Sarawak and described by the respondents as ''Tana Pengurip'' and that of the issuance of a timber licence, Forest Timber Licence No. T/0390 (''the licence'') by the 1st and 2nd appellants in Appeal 1 in favour of the appellant in Appeal 2 was null and void in so far as it impaired the respondents' NCR land.

[4] The appellants, as the defendants, filed an application under o. 18 r. 19 of the Rules of the High Court 1980 ("RHC") to strike out the respondents' case on the ground that limitation had set in.

[5] The learned High Court Judge allowed the application and struck out the respondents' claim. He held that the Public Authorities Protection Act 1948 ("PAPA") and by the Limitation Ordinance of Sarawak ("LOS") had barred the respondents' claim.

In arriving at his conclusion, the learned High Court Judge made a finding of fact that although the licence was granted in 1992, as disclosed in the respondents' pleaded case, they were aware of the existence of the licence and the trespass into their alleged NCR land as early as 1995. Yet action was only commenced in 2007 and no explanation was given for the delay.

[6] On appeal, the Court of Appeal reversed the decision of the learned High Court Judge. The learned judges of the Court of Appeal took the view that although limitation may be a complete answer to a suit, action or proceeding for remedy, it is not an answer to suit, action or proceeding for declaratory orders. They further held that a declaration as to whether or not the rights of the claimants were infringed was not purely academic despite the absence of any order for compensation or damages payable.

[7] Dissatisfied the appellants sought leave from and duly granted by this court. The question for our consideration thus reads:

> Whether the defence of limitation under section 2 of the Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders.

[8] Now, although the question posed deals with the issue of limitation, we are of the view that it is still open for us to consider whether in this case the action of the respondents is statute-barred. After all it depends on the facts of each case whether or not an action is statute-barred. Accordingly we will first deal with this issue.

[9] Section 2(a) of the PAPA reads as follows:

> Where, after the coming into force of this Act any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[10] We do not think it can simply be said that the respondents' cause of action accrued on the date of the licence was granted in 1992 or even in 1995 as found by the learned High Court Judge and thus falling within the first limb of s. 2(a) of PAPA. In our view the second limb of the said section should apply, namely, being "the case of a continuance of injury or damage". The reason we say so is because based on the uncontroverted facts, in particular the fact that in the licence granted it is clearly stated that the date of issue is on 30 March 1992 while the date of expiry is on 29 March 2012. Therefore the licence was still valid at the time the action was filed.

[11] We also noted that cl. 29(a) of the licence clearly stipulated thus:

> This licence is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forests Ordinance.

During the hearing we drew the attention of the parties to it and all agreed that the licence was subject to the respondents' NCR, if any.

[12] As such we are of the view that as long as the licence remains valid, it continues to be subject to the respondents' NCR, if any, and rights in respect of the land concerned. Accordingly, the second limb of s. 2(a) PAPA applies, being a continuing injury or damage upon the NCR and rights of the respondents. (see: *Ronald Beadle v. Hamzah HM Saman & Ors* [2007] 1 CLJ 421 and *Ibrahim Mohideen Kutty v. Timbalan Menteri Dalam Negeri & Ors* [2003] 6 CLJ 144. The respondents' action is therefore well within time since time would only begin to run from 30 March 2012.

[13] Learned counsel for the appellant in Appeal 2 attempted to impress upon us that his client had not been exercising its rights conferred by the licence for the preceding years and therefore the injury or damage, if any, cannot be said to be continuous. Our simple response to that is surely such an argument must be brought up at trial and not be a ground for summary disposal in the absence of any strong evidence to substantiate the same. In other words it is a triable issue to be determined. Further, the claim to the NCR land by the respondents does disclose a cause of action that should be determined by a full trial.

[14] Further, we are of the view that as long as the licence remains valid, there is always a threat to the respondents' NCR and rights thereby entitling them to a valid cause of action premised on the second limb of s. 2(a) of PAPA.

[15] Premised on the foregoing reason alone we are of the view that this appeal, being an interlocutory appeal in the first place, should be dismissed and the action should proceed for trial as soon as possible. We therefore decline to answer the question posed since any view we give will be deemed obiter and academic in so far as this case is concerned.

[16] We now invite the parties to address us on the issue of costs.